88- 1829

No. _____

Supreme Court, U.S.
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CLERK

In The

Supreme Court of the United States

October Term, 1988

JULIUS E. CRUSE,

Petitioner,

vs.

FAYETTE COUNTY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

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QUESTIONS PRESENTED

1. Whether a rural property owner who has operated upon his own property since 1967 an outdoor commercial amusement and recreational facility, that is, an outdoor campground offering fishing, swimming, sun bathing, waterslide, and overnight parking for recreational vehicles to the public at large, and upon which he has made large expenditures of money for improvements, can be forced by subsequent amendments to the County zoning regulations enacted in 1984, 1986 and 1988 to discontinue his entire business which he has operated for 21 years as a campground under the then current County zoning regulations.

2. Whether such a property owner is entitled to compensation, pursuant to 42 U.S.C. 1983, and the Fifth Amendment to the United States Constitution, for the period in which he is denied aforesaid use of his property for a taking of his property before the Courts finally determine that the amendments aforesaid effect such a taking of property, in accord with the decision of this Court in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California*, 482 U.S. 304, 96 L. Ed. 2d 250, 107 S. Ct. 52, 2378 (1987) (hereinafter abbreviated as *First Evangelical Church*).

Petitioner respectfully requests this Court to consider all subsidiary questions fairly included within aforesaid two questions, pursuant to Rule 21 (1) (a) of the Rules of this Court.

PARTIES IN THE PROCEEDING

Both the Petitioner and the Respondent named in the caption of this case are parties to the proceeding. Also named as parties are officials of Respondent County: Dennis Burkelbaugh, Chuck Watkins, Steve Black, Mike Reid, Ron Martin and Perry Hiott as Cross-Defendants in Petitioner's counterclaim (R. 20 – R. 34) for damages and punitive damages for a constitutional tort pursuant to 42 U.S.C. 1983 for the unlawful taking of his property, under color of law.

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JULIUS E. CRUSE,

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vs.

FAYETTE COUNTY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

JULIUS E. CRUSE petitions this Court for a Writ of Certiorari to review the judgment of the Supreme Court of Georgia entered in the case of *Cruse v. Fayette County* (Appeal No. 46425, Supreme Court of Georgia) on the 8th day of February, 1989, affirming without opinion, pursuant to Rule 59 of said Court, the judgment of the Superior Court of Fayette County entered on September 21, 1988.

The aforesaid judgment of the lower Court (1) enjoined Petitioner from continuing his operation of an outdoor commercial amusement and recreational facility on 38 1/2 acres of real estate owned by Petitioner on which he had operated such a facility since 1967, and (2) denied

Petitioner's counterclaim for a Constitutional tort, a taking of his property without compensation pursuant to 42 U.S.C.A. 1983, without a hearing and without a jury trial, which Petitioner had demanded.

Both the Superior Court and the Georgia Supreme Court ignored and failed to address the principle of law established by this Court's decision in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California*, 482 U.S. 304, 96 L. Ed. 2d 250, 107 S. Ct. 52, 2378 (1987), holding that where a regulation takes all use of a property, the property owner is entitled, under the just compensation clause of the Fifth Amendment, to compensation for the period before the Courts finally determine that the regulation effects a taking of property, although said decision was cited to both Courts.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3), Petitioner having at all times asserted a deprivation of his rights secured by the United States Constitution, more particularly the Fifth Amendment thereto and having filed a counterclaim for damages and punitive damages against the Respondent County and certain of its officials for taking his property under color of law without paying him compensation in violation of the Fifth Amendment to the United States Constitution, and in violation of 42 U.S.C.A. 1983.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment To The United States Constitution

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, *nor be deprived* of life, liberty, or *property, without due process of law; nor shall private property be taken for public use, without just compensation.*" (Emphasis added.)

Statute: 42 U.S.C. 1983

> "Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For purposes of this section, any Act of Congress applicable exclusively to the District of Columbia, shall be considered to be a statute of the District of Columbia."

HOW THE FEDERAL QUESTION WAS RAISED

A) IN THE SUPERIOR COURT

In the Superior (trial) Court, Petitioner directly raised the federal question in his counterclaim against Respondent and certain of its officials seeking compensation and

punitive damages pursuant to 42 U.S.C.A. 1983 and citing *First Evangelical Church,* supra. The trial court ruled that Petitioner had not made out a case, at a non-jury hearing in which the counterclaim had been expressly reserved for a later hearing, and without hearing evidence on the 1983 claim. The trial Court did not discuss the principle of *First Evangelical Church,* supra, in its Order (See R. 69 or Appendix 1, Page 2).

B) IN THE SUPREME COURT OF GEORGIA

On appeal to the Supreme Court of Georgia, Petitioner's enumeration of error No. 5 alleged error in the trial Court's invalidating the 1983 action, and also cited *First Evangelical Church,* supra. As stated previously, the Georgia Supreme Court merely affirmed without opinion.

The federal question was clearly presented to both Georgia Courts, but was not discussed by either Court.

STATEMENT OF THE CASE

As concisely as can be stated in this complex case in which Certiorari is sought in the culmination of years of controversy and a previous litigation between Respondent and Petitioner, the owner of Camper's Paradise, a 38 1/2 acre rural tract of land in Respondent County utilized as an outdoor commercial amusement and recreational facility since 1967. The property was utilized as a campground affording camping facilities for recreational vehicles, and initially a golf driving range, pony rides, go-cart track and swimming lake (since phased out), and

replaced with a waterslide, fishing lake and beach (T. 89-93).[1]

The development of the property since 1967 as a campground was with the approval and knowledge of then County Engineer Strother (T. 163). Petitioner was also granted business licenses by Respondent to operate a campground in 1979 and 1985 (T. 38). He developed additional campsites for tents and self-contained recreational vehicles, and provided water, electricity and sewage connections for campsite purposes (T. 89-93).

Petitioner's property was zoned under the C-4 (10) Zoning Ordinance of 1960 for "outdoor amusement enterprises." In 1971, a Comprehensive Zoning Ordinance was enacted that abolished C-4 Zoning (O.T. 31-32). Then, on November 13, 1980, a rezoning ordinance was adopted, which did not include a C-4 designation under commercial districts; however, in AR (agricultural residential) "outdoor commercial amusement and recreational facilities" were permitted (O.T. 216). Petitioner thereafter

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[1] The record in the instant case is denoted as (R-page) or (T-page). A previous Petition for Equitable Relief filed by Respondent, in 1985, against Petitioner seeking an injunction to restrain him from continuing his operation of Camper's Paradise was decided adversely to him, and said judgment was affirmed without opinion by the Supreme Court of Georgia. The record of that litigation was ordered combined with and made a part of the record in the instant case. References to the prior case (No. 44164, Supreme Court of Georgia) will be denoted by O.T. or O.R. (for *old* transcript of *old* record) where appropriate, with page numbers added.

continued to expand and add to the number of campsites, with water, sewage, and electric hookups (O.T. 163-171).

In 1984, Respondent amended the 1980 zoning ordinance which deleted from AR Zoning the "outdoor commercial amusement and recreational activities" (Pl. Exh. 37, O.T. 219). This resulted from complaints about Petitioner placing hookups for recreational vehicles where they would be visible from the highway (O.T. 123). Respondent then sent letters to Petitioner stating that he would be allowed to maintain all existing buildings and structures on the property prior to the 1980 ordinance and continue to operate as an "outdoor amusement facility" without any further expansion (O.T. 226-228, Dft. Exh 2, 3, 4).

In September, 1984 and July, 1985, Petitioner was served with "Stop Work Orders" from Respondent's Planning and Zoning Department to the effect that his property was zoned AR and that an outdoor commercial recreational facility was not a permitted use (Pl. Exh. 6, O.T. 188).

Respondent then filed a Petition for Equitable Relief, as stated in footnote 1, seeking to restrain Petitioner for continuing his business at Camper's Paradise (O.R. 3). After hearing, the trial Court on April 26, 1986 ruled that the 1984 Amendment was void because of faulty advertising and non-posting of property and allowed Respondent 60 days within which to re-enact the 1984 Amendment (R. 108). This was done on July 3, 1986 (R. 128). The trial Court entered an Order on September 26, 1986, allowing no further evidence by Petitioner and

holding that the 1984 Amendment was now constitutional (O.R. 108, 157, 168).

Petitioner's appeal of this Order resulted in the Georgia Supreme Court's affirmance without opinion of the trial Court's Order.

This brings us to the Order which is the subject of this Application for Certiorari. On August 4, 1987, Respondent filed a Petition for Equitable Relief, alleging that Petitioner was operating his campground as an illegal nonconforming use and requested the issuance of an injunction to restrain Petitioner from continuance of such use (R. 7-10).

Whereupon, Petitioner filed his Response and Cross-Complaint. In the latter, he joined with the Respondent four members of the Board of Commissioners, the Director of Planning and Zoning and the Zoning Administrator of the Respondent County in an action for damages for conspiracy to and depriving him under color of law of his rights to his property, in violation of the Fifth and Fourteenth Amendments to the United States Constitution and of 42 U.S.C. 1983, seeking punitive damages and a declaratory judgment that he has a vested right to develop his property pursuant to the 1980 Comprehensive Zoning Ordinance for outdoor commercial recreational facilities (R. 23-24). *Martinez v. California*, 444 U.S. 277, 62 L. Ed. 2d 481, 100 S. Ct. 553 (1980). (General holding: State courts have concurrent jurisdiction of a Section 1983 claim.)

On August 17, 1988, the trial Court was reminded by letter brief that "all issues as to any counterclaim or involving jury issues were postponed (at the last appearance in Court) until after the hearing on August 23." Among the issues to be decided at the hearing was "the

application of the grandfather provision relative to operating an outdoor commercial recreational facility" since prior judicial admissions by Respondent had established such fact (R. 71-73, See Court's Order, R. 65).

Thereafter, as scheduled on August 23, 1988, a hearing was held without a jury. On September 21, 1988, the trial Court entered the Order *which is the subject of this Application for Certiorari.* (See App. 1.)

The complete Order is appended to this Application, Rule (1) (k), as Appendix 1.

The portions of said Order which Petitioner contends are erroneous are:

(a) The finding of fact that Petitioner was operating an "overnight vehicular park", without having been authorized to do so, either prior to April of 1986 or subsequent to April of 1986 (R. 68).

(b) The granting of a permanent injunction against Petitioner's use of that property in violation of the amended zoning ordinance of August 28, 1986 (R. 66).

(c) The finding that Petitioner's use of this land as an overnight park for vehicles has been from its inception an illegal nonconforming use and still remains so (R. 68).

(d) The finding that Petitioner's counterclaim alleging a Constitutional tort under 42 U.S.C.A. is denied because the Petitioner has failed to make a case on the counterclaim, in a non-jury hearing with no evidence on the merits of the counterclaim and ignoring *First Evangelical Church,* supra (R. 69). This was ordered *after* the previous Order postponing issues on the counterclaim.

(e) The denial of Petitioner's requested declaratory judgment that he has a vested right of overnight camping, against the weight of the evidence and the pleadings of both parties (R. 69).

(f) The Court's direction to Petitioner to remove from his property all vehicles within 30 days from the date of the Order, or any affirmance of the Order, and the direction to the Respondent County to impound on the 31st day all such vehicles (R. 70).

Petitioner appealed this Order to the Supreme Court of Georgia, which again simply affirmed without opinion on February 8, 1989. (See App. 2.)

On February 23, 1989, the Georgia Supreme Court granted Petitioner's motion for stay of its mandate for 90 days after February 8, 1989. (See App. 3.)

ARGUMENT: WHY CERTIORARI SHOULD BE GRANTED

A) SUMMARY OF ARGUMENT

In this case, a citizen has been deprived of the business use of his property, after 21 years of similar operation, by the enactment of new zoning regulations, and such deprivation has been affirmed by the Georgia Courts. Petitioner respectfully insists that a decision by this Court, the highest in the United States, would have great influence, not only in this case, but in similar cases which may arise in the future in any State of this country. The *First Evangelical Church*, supra, case has generated widespread interest and discussion, and a decision in the

instant case would clarify some questions that have been posed by that earlier decision.

b) PRINCIPLE ARGUMENT

When this Court's decision in *First Evangelical Church* was initially rendered, widespread interest nationwide was aroused by it. The ruling was widely discussed by (1) the news media, (2) legal scholars, and (3) municipal and county officials charged with controlling the use of land through zoning ordinances. The focus of such discussion was whether that decision would have the effect of inhibiting local or State officials from effectively controlling land use through zoning or other ordinances because of their fear of being personally sued for damages or compensation by some aggrieved landowner whose property rights were abridged by such local laws. This case presents a classic illustration of how a property owner can have the use of his property stripped away from him, without compensation or other legal resources. It is important enough to merit consideration by this Honorable Court, which would be informative to the rest of this country.

The record in this case is replete with subsidiary questions fairly comprised within the two questions presented. For example, the ruling of the trial Court goes outside the pleadings of both parties, and finds Petitioner is operating *a mobile home park*. Respondent in his injunctive action did not so allege. Instead, Respondent alleged Petitioner was operating an outdoor commercial amusement and recreational facility (R. 3, T. 38). Other witnesses for Respondent established that fact (T. 122, 127; T.

133, 134, 135, 139; T. 143, 144, 147). Petitioner testified to the same use of his property (T. 163-167, 171). Finally, Respondent's own evidence shows that Petitioner's use would be recommended for approval provided he agreed that he would not expand, not utilize any RV sites closer than 300 feet to the road (along the southern boundary of his property), would limit the stay of vehicles to six months, not intrude into the flood plain of a creek that abuts his property for 500 feet, etc. (T. 72, 73). Obviously, Petitioner could not afford to abandon 800 feet of a 38 1/2 acre lot which he had developed at great expense to himself. Thus, an issue exists as to the sufficiency of the evidence to support the trial Court's Order.

Another subsidiary issue exists as to whether Petitioner acquired a vested interest in the use of his property by such use over many years, with the knowledge of Respondent's officials. See *Barker v. County of Forsyth*, 248 Ga. 73, 281 S.E. 2d 549 (1981) and *Shulman v. Fulton County*, 249 Ga. 852, 195 S.E. 2d 103, both dealing with the vesting of rights where applicants for a permit have incurred substantial expenses in developing their business use of property.

Finally, the record shows that Petitioner's property, called Camper's Paradise, was the only such facility operating in Respondent County (O.T. 40) and that the 1984 zoning change was to allow the County authorities to control its continued development by requiring the owner (Petitioner) to apply for additional zoning modifications or changes (O.T. 56, 53). Thus, the issue of specific "spot zoning" is another subsidiary issue.

We will not go further in setting out such subsidiary issues, as conciseness is required by this Court's Rules.

CONCLUSION

Petitioner prays that Certiorari be granted to review aforesaid issues, which are important to State Courts across the country who may confront 1983 actions against governing officials and legal governmental entities for the taking without compensation of the use of property under color of law.

Respectfully submitted,

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APPENDIX

(1.) Order of Superior Court for which Review by Certiorari is sought.

IN THE SUPERIOR COURT FOR THE
COUNTY OF FAYETTE

STATE OF GEORGIA

FAYETTE COUNTY,	:	CIVIL ACTION FILE
Plaintiff	:	NO. 87V-706
V.	:	
JULIUS E. CRUSE,	:	
Defendant	:	

ORDER

Plaintiff, Fayette County instituted an action for an injunction against the defendent, Julius E. Cruse, seeking to enjoin the defendant from operating an outdoor recreational vehicle park known as "Camper's Paradise". The defendant counterclaimed alleging a constitutional tort under 42 U.S.C.A. Section 1983 and further sought a declaratory judgment seeking to have this Court declare that he has a vested right for use of this facility for overnight camping. A hearing was held on August 23, 1988. The Court finds as follows:

The issue before the Court is whether or not the present zoning which has been adopted by Fayette County, since the order of this Court in April of 1986 in civil action file number 85V-117, confirmed by the Supreme Court of the State of Georgia, prohibits the use to which the defendant has put this property. The Court finds that it does.

Based upon the facts, this Court finds that the defendant's property was rezoned properly and legally posted with the notice required by Georgia Law after April of 1986, and that thereafter there was no constitutional attack or legal attacks of any kind by the defendant on that change. That thereby establishes the 1986 amendment to the Fayette County Zoning Law as the legal use and legal restrictions upon which this defendant can use and which improvements he can place and which businesses he can operate on the property in Fayette County under the A-R zoning.

The Court further finds, that the defendant does allow overnight vehicular parking, and that some of the structures appear to have improvements that would appear to be permanent or semi-permanent dwellings, and that there are approximately 75 to 100 vehicles and/or camping type trailers or vehicles within the defendant's property at any given time. The Court further finds that pursuant to its Order of April, 1986 the defendant has never been authorized to operate an overnight vehicular park by the zoning authorities of Fayette County or any permitted use permit has been issued either prior to April of 1986 or subsequent to April of 1986.

Therefore, the Court concludes that the defendant's use of this land as an overnight park for vehicles has from its inception been an illegal non-conforming use and still remains an illegal non-conforming use.

Therefore, the plaintiff's complaint for injunction is hereby granted and a permanent injunction against the defendant's use of that property that violates any portion

of Section 6-14 of the Zoning Ordinance of Fayette County as it was amended as of August 28, 1986.

Further, the defendant's counterclaim alleging any constitutional tort of 42 U.S.C.A. Section 1983 is hereby denied as the defendant has failed to make a case on the counterclaim on the 1983 action. This is based upon the fact that the defendant had sought a change prior to 1986 to community-commercial (C-C) zoning and this was denied by the Board of Commissioners of Fayette County and that denial was unappealed. Thereafter in 1986, the Fayette County Board of Commissioners changed the zoning on defendant's property and the defendant having the right to institute a constitutional attack at that time failed to do so and can not now raise any constitutional issues for the first time either on an appeal or in any ancillary or collateral proceeding. The Court further notes that while this action is separate from the original case in Civil Action File Number 85V-117 the same subject matter is dealt with and exactly the same parties. Therefore, the record in Civil Action File Number 85V-117 is hereby incorporated into the record of this case.

As earlier noted, the defendant has filed a declaratory judgment action seeking to have this Court declare that he has a vested right for use of overnight camping. As this Court has previously noted into the record, the use of this defendant of that property for camping vehicles, or overnight parking of any type of vehicles has, and still is an illegal non-conforming use, and it has been so since its inception, continues to be today, and such an illegal non-conforming use cannot form the basis of a vested right under Georgia law. This Court therefore, denies the defendant's relief on the declaratory judgment and the counterclaim.

The defendant is directed that either thirty days from the date of this judgment or thirty days from the date of a final decision by the final Appellate Court is returned to this Court all vehicles shall be removed from the defendant's property. If, on the thirty-first day, either from the date of this Order or from the date that this Order is finally affirmed, if it is so affirmed, if there are any vehicles at all of a camping nature on this property, the County is directed to take wreckers or whatever vehicles that are deemed appropriate, and remove said vehicles and bring them to the County impound lot either on County owned property or leased by the County for that purpose and impound those vehicles until further Order of this Court.

SO ORDERED this 21 day of Sept., 1988.

/s/ Ben J. Miller
BEN J. MILLER, Judge
Griffin Judicial Circuit
Fayette Superior Court

Order prepared by

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Consented to as to form:

/s/ Tony H. Hight by RMM
TONY H. HIGHT

App. 2. Order of Supreme Court of Georgia affirming without opinion lower Court's Order of September 21, 1988.

In the Supreme Court of Georgia

Decided: Feb. 8, 1989

46425. CRUSE v. FAYETTE COUNTY.

Judgment affirmed without opinion pursuant to Rule 59 of this court.

All the Justices concur.

App. 3. Order of Supreme Court of Georgia staying mandate pending Application for Certiorari to this Court.

SUPREME COURT OF GEORGIA

ATLANTA, FEB. 23, 1989

The Honorable Supreme Court met pursuant to adjournment.

BY: Gregory J.

The following direction was given:

JULIUS E. CRUSE V. FAYETTE COUNTY

Upon consideration of the motion for a stay of this court's remittitur in order that an appeal or an application for certiorari may be filed in the Supreme Court of the United States to obtain a review of this court's judgment rendered in this case on 2-8-89 such motion is hereby granted, subject to the following conditions:

(1) The clerk of this court is directed to withhold the transmittal of such remittitur to the trial court for ninety days from the date of this court's judgment.

(2) The clerk of this court is directed to transmit such remittitur to the trial court not later than the ninety-fifth day from the date of this court's judgment, provided that the clerk shall continue to withhold the transmittal of such remittitur if the clerk is notified in writing that an appeal or application for certiorari has been timely filed in the Supreme Court of the United States. Upon the timely filing of such appeal or application in the Supreme

Court of the United States, the clerk is directed to withhold the transmittal of such remittitur until the final disposition of the case by that court.

/s/ Hardy Gregory Jr.
Justice Hardy Gregory, Jr.